83 - 1508 (1)

No. .....

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In The
Supreme Court of the United States
October Term, 1983

SEQUOIA BOOKS, INC., an Illinois Corporation,

Petitioner,

v.

CHARLES McDONALD, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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54 pp

QUESTIONS PRESENTED

1. Whether the seizure of 420 magazines, films and videotapes from petitioner's bookstore was a seizure under a general warrant, in violation of principles of the First and Fourth Amendments to the Constitution of the United States and prior decisions of this Court?

2. Is it permissible under the First and Fourth Amendments of the Constitution of the United States for law enforcement officers to seize under a search warrant, magazines, films and videotapes which have not been specifically the subject of judicial scrutiny, either by descriptive affidavit or actual review?

PARTIES TO THE PROCEEDING

The petitioner is Sequoia Books, Inc., an Illinois corporation, d/b/a Denmark II.

The respondents are Charles McDonald, individually and in his capacity as Sheriff of the County of Kendall, Illinois, Timothy McCann, individually and in his capacity as Deputy Sheriff of the County of Kendall, Illinois, Six Unknown Deputies, individually and in their capacities as Deputy Sheriffs of the County of Kendall, Illinois, Dallas C. Ingemunson, individually and in his capacity as State's Attorney of the County of Kendall, Illinois, Grant B. Wegner and Jean M. Fletcher, individually and in their capacities as Assistant State's Attorneys of the County of Kendall, Illinois, and the County of Kendall, Illinois, a body corporate and politic.

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SEQUOIA BOOKS, INC., an Illinois Corporation,

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CHARLES McDONALD, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 6, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet officially reported. The original opinion of January 6, 1984 was modified in an order denying rehearing entered February 6, 1984. Both the original opinion and the order denying rehearing are included in the Appendix as Exhibits A and B respectively.

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JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. §1254(1) for review by certiorari of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. A written opinion was issued by that court on January 6, 1984. The petitioner, Sequoia Books, Inc. filed a petition for rehearing and suggestion for rehearing *en banc*. That petition was denied on February 6, 1984 in an order that modified the court's original opinion.

The record in this cause was lodged with the Clerk of the United States District Court for Northern District of Illinois, Eastern Division, Chicago, Illinois, on February 14, 1984, with the return of the mandate to that court. Although the mandate has issued, the United States Supreme Court has jurisdiction to review the decision of the United States Court of Appeals regardless of the status of the mandate. *Carr v. Zaja,* 283 U.S. 52, 53 (1931); *Aetna Casualty Co. v. Flowers,* 330 U.S. 464, 468 (1947).

STATEMENT OF THE CASE

On March 23, 1983, Kendall County Deputy Sheriff Tim McCann, presented a complaint for search warrant, with a supporting affidavit, to an Illinois state judge. That affidavit gave a legal description of the bookstore location operated by petitioner and further identified by title seven magazines and one movie. These items were described as containing depictions of certain explicit sexual activity. No items were provided to the judge for his actual review; however, the affidavit asserted that each of these items was currently the subject of criminal charges, namely obscenity, under Ch. 38, §11-20, Ill.Rev.Stat., pending in the Circuit Court of Kendall County. The affidavit also asserted that McCann had gone to the bookstore on March 22, 1983, and observed magazines, movies and videotapes which contained portrayals or depictions of various sexual activities "similar in depiction" to the eight items that had been described. The complaint for search warrant and affidavit are reproduced in the Appendix as Exhibits C and D, respectively.

Illinois Circuit Judge Wilson Burnell acted on the complaint for search warrant and issued a warrant directed to Sequoia's business premises, calling for the seizure of:

> Magazines, movies and video tapes containing depictions or portion thereof of the following: Cunnilingus, fellatio, anal intercourse, vaginal intercourse, excretion of semen from penis onto other persons, masturbation, vaginal or anal insertion of prosthetic devices, insertion of tongue into anus, which has if considered as a whole predominant appeal to the pruirent [sic] interest and has no serious educa-

> tional, literary, artistic, or political value and has no socially redeeming value.

The search warrant is included in the Appendix as Exhibit E.

On March 23, 1983, a search warrant party consisting of McCann and six other Kendall County deputy sheriffs converged on the Denmark bookstore located at 1300 Business 30, Aurora, Illinois. They arrived in several vehicles, including a van, and brought a number of cardboard boxes with them. They were aware they were going to take a substantial number of items, and initially felt that they had no limitation on the number of copies of any single magazine or other material that they were going to confiscate.

After their arrival at approximately 10:00 o'clock a.m., the deputies excused customers in the premises and locked the door. They arrested and removed a sales clerk. For almost four hours, the officiers reviewed magazines and films to determine if they had sexual depictions as identified in the search warrant. Initially the officers put some 625 magazines into the boxes they had brought with them. These magazines were removed from magazine racks on the outer walls of the premises. Later the deputies received instruction that they were to seize only single copies of any one title, so they went back into the boxes and attempted to remove all multiple copies, which were then placed on the floor.

The officers then turned their attention to the store's inventory of films and videotapes. The officers cut padlocks to a movie arcade, and after viewing portions of films on projectors located there to ascertain whether they contained sexual depictions, these films were re-

moved from the projectors and also seized. Films and videotapes located at a front counter were also seized on the basis of sexual depictions portrayed on their covers.

In all, the officers seized 420 separate titles of magazines, movies and videotapes. The average time to review each item seized was approximately 30 seconds, based on the amount of time the officers spent at the Denmark bookstore. Deputy McCann later prepared an inventory of the items seized, and returned some additional multiple copies of single titles.

During the seizure operation, customers came to the Denmark bookstore and tried to enter. On each such occasion, an officer told the customer that the bookstore was closed or closed for inventory. No sales were made during the time the officers were present.

Sequoia Books commenced an action in the United States District Court for the Northern District of Illinois, pursuant to 42 U.S.C. §1983, seeking temporary, preliminary and permanent injunctive relief, and money damages, as well as a declaratory judgment that the search and seizure procedures utilized by Kendall County law enforcement officials was unconstitutional. At an initial hearing on a request for a temporary restraining order, Federal District Judge Frank McGarr held that the search warrant and underlying procedure were valid, thus denying petitioner's prayer for declaratory relief and return of the property seized. Judge McGarr did grant a temporary restraining order prohibiting the closing and locking of the bookstore and removal of customers during searches and seizures. A copy of this order is included in the Appendix as Exhibit F.

Subsequently, on April 14, 1983, after a hearing for a preliminary injunction, the district court denied Sequoia Books any relief, concluding that:

> [T]he search warrant in question . . . described the property to be seized with sufficient particularity to satisfy the requirements of the Fourth Amendment.

After petitioner withdrew its money damage request, the court dismissed the complaint. The respondents did not object to the court's exercise of jurisdiction under principles of abstention set forth in *Younger v. Harris,* 401 U.S. 37 (1971). The court's order of April 14, 1983, is included in the Appendix as Exhibit G.

Sequoia Books appealed to the United States Court of Appeals for the Seventh Circuit. Within its brief to the Seventh Circuit, Sequoia called attention to a subsequent large scale search and seizure operation conducted by the respondents at the Denmark bookstore on May 10, 1983. The taking of 222 magazines under a search and seizure procedure identical to the prior March seizure was the subject of an additional federal civil rights claim by Sequoia. United States District Judge Milton Shadur, on May 12, 1983, after reviewing the procedure, issued a preliminary injunction prohibiting the use of the procedure as being in violation of the First and Fourth Amendments to the Constitution of the United States. The preliminary injunction was encompassed in a written order dated May 20, 1983, and is reproduced in the Appendix as Exhibit H. Respondents did not appeal this order.

On January 6, 1984, the Seventh Circuit issued an opinion affirming the district court's denial of any relief to Sequoia Books. Among other things, the court held that under Illinois law, Ch. 38, §11-20, it was a crime to sell "pornography" and that a magistrate could rightfully conclude that the descriptions in the affidavit establish probable cause that materials to be seized were "pornographic". The court also held that the reference in the search warrant to prurience and social value were superfluous and could be ignored. The court conceded that protected materials could very well fall within the ambit of the descriptions contained within the warrant, but concluded that the situation presented the possibility of only temporary suppression insufficient to invalidate the warrant under the Fourth Amendment. Finally, the court, *sua sponte,* raised the issue of abstention under *Younger v. Harris,* 401 U.S. 37 (1971), but concluded that since it was affirming the district court's order and Sequoia was denied any federal relief, there was no violation of *Younger* principles. The court's analysis of the abstention issue was expanded in an order denying rehearing to Sequoia Books entered February 6, 1984. In that expanded analysis, the court noted that the respondents had waived *Younger* abstention by not raising it before the district court in the first instance.

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REASONS FOR GRANTING THE WRIT

I.

The search warrant procedure utilized by the respondents was the equivalent of a general warrant procedure, and the decision below approving it is in direct conflict with the prior holding of this Court in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).

This case brings into play a constitutional responsibility under the First Amendment for this Court to scrutinize the seizure of arguably protected communicative materials. For over 20 years, the precedents of this Court have condemned large scale search and seizure operations which might serve as a system "for the suppression of objectionable publications". *Marcus v. Search Warrants of Property, etc.*, 367 U.S. 717, 724 (1961). Indeed, the Court has recognized that our nation's most cherished freedom must be closely guarded from the use of governmental power to search and seize:

> The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. For the serious hazard of suppression of innocent expression inhered in the discretion confided in the officers authorized to exercise the power.
>
> *Marcus v. Search Warrants of Property, etc.*, 367 U.S. 717 at 729 (1961).

In *Marcus*, the Court reviewed a Missouri procedure utilized to search for and seize allegedly obscene materials. A police officer had reviewed materials at newsstands and submitted a complaint for search warrant with an affidavit in which he advised a state judge that at certain locations obscene publications were available. Search warrants were issued which allowed the seizure of obscene material. Armed with such warrants, 11,000 copies of 280 publications were seized at six different

businesses. The Court noted that the search warrants utilized merely "repeated the language of the statute and . . . specified no publications, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted 'obscene * * * publications'." *Marcus,* 361 U.S. at 732. The Court concluded that such procedures were constitutionally infirm.

A few years later, in *A Quantity of Copies of Books v. State of Kansas,* 378 U.S. 205 (1964), this Court again had occasion to review a search and seizure procedure concerning allegedly obscene books. Under the Kansas procedure scrutinized, a state court judge made an *ex parte* inquiry during a request for a search warrant, in which he reviewed seven books. The judge concluded that they were obscene, and issued a warrant that allowed for the seizure of any book with a designation "original Night Stand book". When executed, the warrant resulted in the seizure of 1,715 books. The Court held that the authorization of the warrant which permitted the seizure of all copies of specified titles, and the lack of a pre-seizure hearing, rendered the procedure unconstitutional under principles announced in *Marcus.*

The next year the Court condemned a search warrant calling for the seizure of books, records and other written documents pertaining to allegations of Communist activity, concluding that:

> [H]istory indispensably teaches . . . that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain . . . [citations omitted]. No less a standard could be faithful to First Amendment freedoms.
>
> *Stanford v. State of Texas,* 279 U.S. 476, 485 (1965).

In 1973, this Court had occasion to review the constitutional standards underlying permissible regulation and control of obscene material, and announced those standards in *Miller v. California,* 413 U.S. 15 (1973). Contemporaneous with that decision, the Court approved a warrant procedure where a single film was viewed by a neutral and detached judicial officer who then signed a warrant calling for its seizure. However, the Court was careful to ratify the First and Fourth Amendment principles of *Marcus* and *Quantity of Copies of Books,* assuring a court's responsibility to scrutinize "any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment". *Heller v. New York,* 413 U.S. 483, 491 (1973).

Most recently, this Court had occasion to review the constitutional validity of the seizure of a large number of magazines, films, and other materials, from a bookstore under a warrant procedure, in *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979). There, an investigator purchased two reels of film from a bookstore and submitted them, together with an affidavit, to a judicial officer for the purpose of obtaining a search warrant calling for seizure in connection with an investigation into alleged obscene material. The search warrant which issued was left open-ended with no specific items listed. Indeed, the language of the warrant anticipated that the judicial officer was going to the bookstore to review "similar" films. The search warrant party went to the store and conducted a search and seizure procedure that allowed the town justice from two to five minutes to view films and from 10 seconds to one minute to review magazines, to make a probable cause determination regarding the obscenity of each item. Over 800 magazines

and films, as well as other business records, were seized during the six-hour search mission. While the party executing the warrant was at the store, all persons who came to the door were asked to show identification and, as a result, no sales were completed. Finally, an inventory was filed and added to the open-ended warrant.

This Court condemned the foregoing procedure as an impermissible general warrant. The Court noted that the warrant did not particularize items to be seized, leaving "it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure". *Lo-Ji Sales, Inc. v. New York,* 442 U.S. at 325. The Court concluded that the Fourth Amendment did not permit "open-ended warrants".

The search warrant procedure utilized by the respondent law enforcement officials in the present case contain all of the elements of a system of prior restraint that this Court has rejected as being constitutionally impermissible in cases involving warrants calling for the seizure of communicative materials. Here, as in *Marcus,* discretion was left with the executing officers to determine what items met a paraphrased test for obscenity. Here, as in *Quantity,* the seizure of materials that had never been reviewed by the issuing judge was accomplished. Here, as in *Stanford,* the language of the warrant was so sweeping that the issuing judge could never have predicted the extent of seizure that was ultimately accomplished. Here, the authorization of the warrant permitted a violation of the single copy rule of *Heller,* which admittedly the officers did upon their arrival, discontinuing the seizure of all copies of all magazines

only after receiving instructions. Finally, the factual circumstances of this case closely parallel those of *Lo-Ji Sales.*

As in *Lo-Ji,* the context of the present seizure demonstrated a search warrant party aimed at crippling the operation of Sequoia's adult bookstore. The large number of boxes, the closing and locking of the doors, and the turning away of customers, all demonstrate a procedure aimed at prior restraint because the communicative materials available at the bookstore were deemed objectionable by law enforcement officials. The type of scrutiny of the items seized was fleeting, at best, and the numbers alone are telling both on the practical impact of the open-ended warrant, as well as the purpose of the seizures. Petitioner recognizes that obscenity is not protected under the First Amendment to the Constitution of the United States. *Roth v. United States,* 354 U.S. 476 (1957); *Memoirs v. Massachusetts,* 383 U.S. 415 (1966); *Miller v. California,* 413 U.S. 15 (1973). However, determining what is or is not obscene is not a simple task. Separating that which is protected from that which is not requires "sensitive tools", *Speiser v. Randall,* 357 U.S. 513, 525 (1958), and a general warrant, such as utilized in this case, is not such a sensitive tool.

Respondents' success with the general warrant in this case obviously led them to repeat the procedure a little more than a month later, when they returned to petitioner's bookstore and confiscated 222 magazines. The power of a general search and seizure procedure to instill economic disruption and damage at those locations where controversial communicative items are available demonstrates the sound historical and constitutional condemnation for such

procedures. District Judge Shadur, on that occasion, had no difficulty recognizing the application of *Lo-Ji* principles to an open-ended warrant, and granted petitioner a preliminary injunction, declaring the procedure constitutionally invalid. Respondents did not appeal his ruling.

In this case, the holdings of the district court, and of the Seventh Circuit Court of Appeals, ignore the historical condemnation of general warrants and fly directly in the face of the prior holdings of this Court. Accordingly, this Court should acknowledge the significance of the constitutional issues presented by this case and grant certiorari.

II.

The decision by police officers to seize communicative items was made absent judicial scrutiny of those items, and violated the dictates of Marcus v. Search Warrants of Property, Etc., 367 U.S. 717 (1961), and its progeny.

There is a common thread that binds together all of this Court's Fourth Amendment holdings with the underlying First Amendment setting. Interwoven among those decisions, commencing with *Marcus* and culminating with *Lo-Ji Sales, Inc. v. State of New York,* 442 U.S. 319 (1979), is the constitutional safeguard requiring a meaningful judicial focus on the issue of obscenity prior to seizure. Applied properly, those decisions ensure a fabric of freedom and protection for innocent speech.

In rejecting the Missouri procedure in *Marcus,* this Court was careful to note that the judge who issued the search warrant had not scrutinized any of the material that was considered to be obscene, and that the warrants merely

repeated the language of the statute and specified no publications. Moreover, executing officers had unlimited discretion as to what publications were obscene, in their judgment. Indeed, the procedure was rejected "because there was no step . . . before seizure designed to focus searchingly on the question of obscenity." *Marcus v. Search Warrants of Property, etc.*, 367 U.S. at 732.

The Court emphasized the need for meaningful participation by a judicial officer prior to the seizure of a motion picture film in *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968). Based on an affidavit of a police officer who viewed a motion picture film which concluded that the film was obscene, a warrant issued authorizing its seizure. This Court concluded that such a procedure "fell short of constitutional requirements demanding necessary sensitivity to freedom of expression." *Lee Art Theatre*, 392 U.S. at 637. There was no inquiry by the judicial officer under such a procedure into the officer's conclusory determination of obscenity.

In *Roaden v. Kentucky*, 413 U.S. 496 (1973), the Court again endorsed the constitutional requirement of judicial participation prior to the seizure of an alleged obscene film. In *Roaden*, a deputy sheriff viewed a film in its entirety at a drive-in, and then arrested the manager and seized the film without a warrant. In condemning such a procedure, this Court stated:

> Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment

> standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression.
>
> *Roaden v. Kentucky,* 413 U.S. at 504.

The presence of a judicial officer in the most recent First Amendment-related search and seizure case decided by this Court underscored the constitutional necessity for a meaningful judicial focus on the issue of obscenity. In *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979), this Court held that a town justice who joined members of a search warrant party in conducting a large scale search and seizure lacked the neutrality and detachment of a judicial officer. The activity of the town justice was thus equated with the activity of the law enforcement officers, with the Court expressly distinguishing that case from the conduct of a judge in *Heller v. New York,* 413 U.S. 483 (1973). There being no proper judicial focus, the massive seizure was held to be constitutionally invalid.

In the instant case, had the search warrant contained language authorizing the seizure of "obscene" materials, unnamed and yet to be determined, it would have been quickly condemned as being in violation of principles of *Marcus* and the other reviewed decisions of this Court. But a closer look at the search warrant language and the status of the law in Illinois demonstrates that executing law enforcement officers were left with the same type of

unguided discretion that has long been condemned by this Court. Illinois, of course, adheres to a tripartite test for obscenity, that is, that material to be obscene must, taken as a whole, appeal to a prurient interest in sex; such material must contain patently offensive depictions of explicit sexual conduct as specifically defined by Illinois law, including the holdings of prior Illinois decisions; and, such material must be utterly without redeeming social value. *People v. Ridens (Ridens I)*, 51 Ill.2d 410, 282 N.E.2d 691 (1972), vacated and remanded as *Ridens v. Illinois*, 413 U.S. 912 (1973); *People v. Ridens (Ridens II)*, 59 Ill.2d 362, 321 N.E.2d 264 (1974); *Ward v. Illinois*, 431 U.S. 767 (1977); Illinois Revised Statutes, Ch. 38, §11-20(b).

The search warrant involved in this case contained in its authorizing language a paraphrased definition of obscenity under Illinois law. The search warrant did not detail or otherwise list any specific magazines, films, or videotapes that were to be seized. Thus, the judicial officer who reviewed the affidavit was not conducting any sort of pre-seizure review of items to be seized. The only pre-seizure focus in this case was that conducted by the deputy sheriffs who looked at magazines and films, or their covers, for approximately 30 seconds before concluding under that paraphrased definition that an item was obscene and, thus, "seizable" under the warrant. Here, as in *Marcus*, officers made *ad hoc* decisions without the reflection or deliberation that should be made by a judicial officer in the first instance, prior to seizure. *Marcus*, 367 U.S. at 732.

The search warrant under review here gave no more guidance to executing officers than the Illinois Obscenity Statute and the prior case law construing that statute. If

the holding below is left standing, an Illinois prosecutor will argue that there is no need for a judicial officer to review materials prior to seizure. Under that holding, the prosecutor will argue that police officers can make the determination of what is or is not obscene. This Court has long rejected the making of hurried judgments during a search by police officers "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Moreover, in its opinion below, the Seventh Circuit Court of Appeals indicated that the first and third elements of the tripartite test for obscenity were "surplusage", and that material containing any of the enumerated sex acts could properly be seized. The court's opinion thus not only dispenses with the requirement of a judicial officer and a meaningful pre-seizure focus, it equates obscenity and pornography in error, and at the worst, redefines obscenity as pornography, in direct contradiction of this Court's holding in *Miller v. California*, 413 U.S. 15 (1973).

The longstanding requirement of a searching judicial focus for a pre-seizure determination of obscenity is a constitutional safeguard to permit the objective assessment of materials arguably protected under the First Amendment during circulation and dissemination to the public. Eliminating judicial focus and turning the responsibility over to law enforcement officials gives those governmental officials a power of censorship under the guise of the power of search and seizure. This Court has not permitted such a system of restraint in past decisions, and should recognize the flagrant constitutional error of

the lower court holdings in this case. Certiorari should be granted.

CONCLUSION

In its opinion below, the Seventh Circuit Court of Appeals, *sua sponte,* raised an issue of abstention under *Younger v. Harris,* 401 U.S. 37 (1971). Ultimately, however, the court held that the respondents had waived the issue in the district court. *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 480 (1977); *Universal Amusement Co. v. Vance,* 587 F.2d 159, 163, n. 6 (5th Cir. 1978). Sequoia Books does not accept the lower court's analysis of abstention, but because of the determination of the waiver issue below, does not raise the issue within its petition for certiorari. It is enough to observe that the deference and comity due state courts under proper *Younger* circumstances are equally cognizable regardless of the grant or denial of relief to a federal plaintiff. If a true abstention issue is present in this case, the entire ruling must be vacated, not just a ruling that would be in favor of a federal plaintiff.

Nevertheless, this case presented egregious factual circumstances where respondent officials, acting under color of state law, conducted a massive search and seizure that imposed a system of prior restraint on petitioner's bookstore. This Court should grant certiorari to review

and reverse the holding of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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March, 1984

APPENDIX

EXHIBIT A

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 83-1699

SEQUOIA BOOKS, INC., an Illinois corporation, d/b/a Denmark II,

Plaintiff-Appellant,

v.

CHARLES McDONALD, individually and in his capacity as Sheriff of the County of Kendall, Illinois, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 C 2064—Frank J. McGarr, *Chief Judge.*

Argued December 8, 1983—Decided January 6, 1984

Before PELL, CUDAHY, and POSNER, *Circuit Judges.*

POSNER, *Circuit Judge.* Sequoia Books, a corporation that owns a bookstore in the town of Aurora, in Kendall County, Illinois, brought this civil rights suit under 42 U.S.C. § 1983 against county law-enforcement officers and

the county itself, seeking injunctive relief and damages in respect of the defendants' seizure under warrant of several hundred magazines, movies, and videotapes from the store. The district court denied a motion for a preliminary injunction, and concluding that Sequoia could not possibly establish a right to damages dismissed the complaint in its entirety. Sequoia has appealed, but asks only that the part of the district court's order denying equitable relief (return of the seized magazines and an injunction against future seizures) be reversed. Sequoia acknowledged at argument that it would not be able to to prove damages.

The Fourth Amendment provides (so far as pertains to this case) that "no Warrants shall issue, but upon probable cause, . . . particularly describing the . . . things to be seized." The State of Illinois makes it a crime, see Ill. Rev. Stat. 1981, ch. 38, ¶ 11-20, as it may without violating the First Amendment, *Roth v. United States,* 354 U.S. 476 (1957), to sell pornography; and there is no doubt that the magistrate who issued the warrant for the seizures from Sequoia's bookstore had probable cause to believe that the materials seized were pornographic. Although he did not have before him copies of any of those materials, he did have a detailed affidavit from a police investigator which described in minute and indeed rather disgusting detail nine magazines that the investigator had read in the store. The least unprintable of the descriptions reads as follows: "Magazine entitled 'Let's F . . . ' containing therein pictures describing vaginal intercourse, anal intercourse, cunnilingus and fallatio [sic]." The affidavit provided an adequate basis for the "searching review" that the magistrate is required (by such cases as *Heller v. New York,* 413

U.S. 483, 488-89 (1973)) to undertake before issuing a warrant for the seizure of obscene materials, and established probable cause for the warrant. *United States v. Espinoza,* 641 F.2d 153, 163-64 (4th Cir. 1981); *Sovereign News Co. v. United States,* 690 F.2d 569, 572 (6th Cir. 1982) (dictum).

On the basis of this affidavit the magistrate issued a warrant authorizing the seizure from the store of not only the nine magazines described in the affidavit but any "Magazines, movies and video tapes containing depictions or portion[s] thereof of the following: Cunnilingus, fellatio, anal intercourse, excretion of semen from penis onto other person, masturbation, vaginal or anal insertion of prosthethic [sic] devices, insertion of tongue into anus; which has if considered as a whole a predominant appeal to the pruirent [sic] interest and has no serious educational, literary, artistic or political value and has no socially redeeming value." Sequoia argues that the description was not sufficiently particular to satisfy the Fourth Amendment read in light of the First Amendment, because it did not prevent the officers, incorrectly appraising the educational, aesthetic, or political value of the magazines, movies, and videotapes that Sequoia sells, from seizing items that might be protected by the First Amendment despite their graphic treatment of sex. But the part of the description that refers to value was surplusage, no doubt added by the magistrate simply out of an abundance of caution, and it can be ignored. By confining the officers to seizing materials that contained depictions (in context, photographic) of sexual intercourse and the variants thereof described in the warrant, the warrant satisfied the requirement of par-

ticular description; and the inclusion of the language about redeeming values did not broaden, though it may not effectively have narrowed, the warrant's scope.

There was, it is true, a possibility that photographs of sexual acts might be redeemed by aesthetic or other values, and hence that the officers might seize constitutionally protected materials. But the possibility was slight. And it must be remembered that seizure under a warrant is not destruction (a distinction stressed in *Heller v. New York, supra,* 413 U.S. at 488-93); it is temporary removal from the owner's possession; the state cannot destroy a magazine as obscene without proving that its prurient character is unredeemed by artistic or other socially valuable properties. The slight possibility of a temporary suppression of constitutionally protected sex magazines is not enough to invalidate the warrant under the Fourth Amendment. Nor would it be feasible to eliminate even this slight possibility by requiring that the warrant name the particular issues of the particular magazines to be seized. The defendant officers would have had to buy every issue of every magazine (and every movie and videotape) that they thought obscene—not just the nine magazines that they described to the magistrate. But their attempts to do so would have aroused Sequoia's suspicions, and it would have refused to sell to them. Or if the officers had reason to believe that Sequoia was warehousing obscene magazines somewhere, under Sequoia's view they could not search the warehouse unless they happened to know the names and dates of particular magazines, and those would be the only items they could seize.

The law does not tie law enforcers' hands so tightly. *In re Property Belonging to Talk of the Town Bookstore,*

Inc., 644 F.2d 1317, 1319 (9th Cir. 1981), upheld a warrant very similar to the one in this case—except that it made no reference to redeeming value. And a vaguer warrant ("obscene magazines, including, but not limited to magazines entitled 'Erotic Hands'") was upheld in *United States v. Espinoza, supra,* 641 F.2d at 163-65. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326-27 (1979), the case on which Sequoia mainly relies, invalidated a warrant that authorized the executing officers to seize materials "similar" to those the magistrate had determined probably were obscene. That delegation was too broad, but here the officers were confined to sexually graphic depictions. Also in *Lo-Ji* the magistrate joined the officers in their foray into the defendant's store and conducted a probable-cause hearing on the spot, and the Supreme Court thought that by doing this he had lost his neutrality. *Id* at 328. There is nothing like that here.

We have assumed so far that the defendants' purpose in seizing the magazines and other items was the lawful one of obtaining evidence for a criminal prosecution. If instead their purpose was to drive Sequoia out of business without due process of law, or even just to harass Sequoia by strewing its stock of magazines on the floor, it would be no defense to a civil rights suit that the officers had in their possession a warrant valid on its face. See *Johnson v. Miller,* 680 F.2d 39, 42 (7th Cir. 1982). At argument Sequoia's counsel said that the defendants had had an improper purpose, and in support of this contention he noted that the criminal prosecution against the store's sales clerk had been dismissed (though he added that the dismissal has been appealed) and that the executing officers had deposited on the floor of the store the magazines they had not

seized and as a result the store was closed for several hours. However, in its brief in this court Sequoia has abandoned not only its claim for damages but any claim based on the purpose for or the manner in which the warrant was executed; it has staked everything on persuading us that the warrant lacked particularity and probable cause. Stray remarks in oral argument will not revive abandoned claims. And should the defendants continue to harass Sequoia in the manner that its counsel alleges, the doors of the federal courts will be open to it.

Though neither side has mentioned it, we note that this might have been a proper case for abstention under *Younger v. Harris,* 401 U.S. 37 (1971), and in particular its companion case, *Perez v. Ledesma,* 401 U.S. 82, 83-85 (1971), which involved a prosecution for sale of obscene magazines. See also *Stefanelli v. Minard,* 342 U.S. 117, 120-23 (1951); *Ciotti v. County of Cook,* 712 F.2d 312 (7th Cir. 1983). When Sequoia brought this suit to enjoin the use of the materials seized from it in any criminal or other proceedings against it and to get the materials back, the state had a criminal proceeding pending against Sequoia's sales clerk in regard to the same allegedly obscene materials. That proceeding might have been thwarted, or at least hindered, if Sequoia had obtained the equitable relief it sought in the present case, although this is not altogether clear. Since the clerk presumably could not assert Sequoia's rights under the Fourth Amendment, the state presumably could make copies of the materials before returning them to Sequoia, and use those copies in its prosecution of the clerk. But we need not pursue these byways; since Sequoia was denied relief below, affirmance does no harm to the policy of *Younger*—and of course failure to abstain does not deprive a federal court of its juris-

diction over a case. *Waldron v. McAtee,* No. 83-1358, slip op. at 3 (7th Cir. Dec. 22, 1983). But it would have been better for the district court to have considered the question whether to abstain before proceeding to the merits.

The judgment dismissing the complaint is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

EXHIBIT B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

February 6, 1984.

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge

SEQUOIA BOOKS, INC., an Illinois corporation, d/b/a Denmark II,

Plaintiff-Appellant,

vs.

No. 83-1699

CHARLES McDONALD, Individually and in his capacity as Sheriff of the County of Kendall, Illinois, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 83 C 2064
Frank J. McGarr, *Chief Judge.*

ORDER

On January 25, 1984, plaintiff-appellant Sequoia Books, Inc., filed a petition for rehearing with suggestion for rehearing *en banc.* All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc.* The petition is therefore DENIED.

The court's opinion of January 6, 1984 is amended as follows. The second paragraph on page 5 of the opinion (carrying over to the top of page 6) is deleted, and the following language is substituted for it:

Although the defendants did not ask the district court and have not asked us to abstain from deciding the constitutional issues in this case, we think we ought at least to consider the question whether we are obliged on our own initiative to consider abstention under *Younger v. Harris,* 401 U.S. 37 (1971), and *Hicks v. Miranda,* 422 U.S. 332, 348-49 (1975), the latter a case similar to the present case except involving a theater rather than a bookstore. As in *Hicks,* when Sequoia brought this suit to enjoin the use of the materials seized from it in any criminal or other proceedings against it and to get the materials back, the state had a criminal proceeding pending against Sequoia's sales clerk in regard to the same allegedly obscene materials; and that proceeding might have been thwarted, or at least hindered, if Sequoia had obtained the equitable relief it sought in the present case. This is not certain: since the clerk presumably could not assert Sequoia's rights under the Fourth Amendment, the state presumably could make copies of the materials before returning them to Sequoia, and use those copies in its prosecution of the clerk. *Hicks* may therefore be distinguishable, because the full-length movie upon which the state had based its prosecution there could not easily be copied; also, the theater owner was trying to get the statute under which his employees were being prosecuted declared unconstitutional, an even more palpable interference with the prosecution than involved in seeking the return of the film.

Whether or not *Hicks* is distinguishable on these or other grounds, there is the anterior question whether abstention on the basis of the *Younger* doctrine (the doctrine

applied in *Hicks*) is appropriate when no party asks for abstention. The question is difficult to answer categorically. Although failure to abstain does not deprive a federal court of its subject-matter jurisdiction, and although *Younger* abstention more than *Pullman* abstention (abstention in favor of state proceedings that may make a difficult federal constitutional question moot) is designed for the protection of a party (the state, or its officers) rather than for the protection of the federal courts themselves, the Supreme Court in *Schlesinger v. Councilman,* 420 U.S. 738, 743 (1975), gave *Younger* itself as an example of a case where an appellate court reversed a judgment on the basis of an issue not raised in the trial court. But then in *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 480 (1977), the Court held that the state could waive any rights it might have under *Younger* if it wanted to remain in federal court; and maybe silence should be construed as waiver, as implied in *Universal Amusement Co. v. Vance,* 587 F.2d 159, 163 n. 6 (5th Cir. 1978).

We do not think it is necessary, and think in fact that it would be imprudent, for us to hold that a federal court has no power in any circumstances to abstain on its own initiative on the basis of the *Younger* doctrine. It is sufficient for purposes of the present case to hold that, whether or not the district court might have been jusified in abstaining on its own initiative, we are not required to abstain at this stage. Since Sequoia was denied reiief below, affirmance can do no conceivable harm to the policy of *Younger;* can create no interference with the pending state prosecution. We therefore need not decide whether the district judge should or could have abstained on the authority of *Younger* or *Hicks,* notwithstanding the defendants' failure to ask him to abstain.

EXHIBIT C

COMPLAINT FOR SEARCH WARRANT

Timothy McCann, Complainant, being first duly sworn on oath, now appears before the undersigned Judge of the Circuit Court for the Sixteenth Judicial Circuit, Kendall County, Illinois, and requests the issuance of a Search Warrant to search the person or place as follows: Building known as Denmark Bookstore, 1300 Business 30, Aurora, Kendall County, Illinois, premises described in attached Exhibit "A" incorporated herein and seize the instruments, articles or things which have been used in the commission of, of which constitute evidence of, the offense of OBSCENITY in violation of Chapter 38, Section 11-20, Illinois Revised Statutes.
Said instruments, articles or things being described as follows:

Magazines, movies and video tapes containing depictions or portion thereof the following: Cunnilingus, fellatio, anal intercourse, vaginal intercourse, excretion of semen from penis onto other persons, masturbation, vaginal or anal insertion of prostethic devices, insertion of tongue into anus, which has if considered as a whole a predominant appeal to the pruirent [sic] interest and has no serious educational, literary, artistic, or political value and has no socially redeeming value.

Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the person and/or place set forth above:

See Attached affidavit of Timothy McCann is adopted and incorporated herein.

Subscribed and sworn to before me,
this 22nd day of March, 1983,
at 4:42 p.m.

/s/ Wilson D. Burnell
Circuit Judge

/s/ Timothy McCann
Complainant

EXHIBIT D

Timothy McCann, being first duly sworn, deposes and says as follows:

1. That this affiant is an investigator for the Kendall County State's Attorneys office and is empowered as a deputy sheriff for the County of Kendall.

2. That this affiant is familiar with a business being conducted on 1300 Business 30, Aurora, Oswego Township, Illinois, known as Denmark Bookstore and situated on the following described premises: See Attached EXHIBIT "A".

3. That this affiant has searched the records of the Kendall County Clerk's and Recorder's office and ascertained that an assumed name certificate was filed on the 14th day of June 1982, identifying one Donald Gittleson as the operator of the business known as Denmark Bookstore located at Route 30, Oswego Township, Kendall County, Illinois.

4. That numerous charges have been filed in the Circuit Clerk's office of Kendall County, Illinois subsequent to July of 1982 under the obscenity statute, namely, Chapter 38, Section 11-20, against various persons resulting from the purchase of magazines and movies from the Denmark Bookstore as above described, which charges this affiant is familiar with and which charges are described as follows:

a. magazine entitled "Taboo" containing therein pictures depicting cunnilingus, depiction of the insertion of a prosthetic device vaginal and anally the insertion of fingers vaginally, the licking of

the breasts of one nude female by another female and masturbation;

b. Magazine entitled "All About Leo" containing therein pictures describing fallatio [sic], anal intercourse, masturbation, also depicting a white liquid substance dripping from the penis of one nude male, said penis being held in close proximity of the face of another nude male, said second male having the white liquid substance on his face, nose and neck, and the insertion of the tongue of one male into the anus of another male;

c. magazine entitled "The Big Weenie" containing therein pictures depicting anal intercourse, masturbation, rectal insertion of fingers, fallatio [sic] and depicts a white liquid dripping from the penis of one nude male, said second male having the white liquid substance on his face, nose and chest;

d. Magazine entitled "Suck a Prick Girls" containing therein pictures describing fallatio [sic], vaginal intercourse, cunnilingus and anal intercourse, two female subjects connected anally with a prosthetic device, depiction of insertion of same kind of device vaginally and anally;

e. Magazine entitled "Let's Fuck" containing therein pictures describing vaginal intercourse, anal intercourse, cunnilingus and fallatio [sic];

f. Magazine entitled "Eat My Load" containing therein pictures describing fellatio and anal intercourse;

g. Movie entitled "Palace of Pleasures No. 3" containing therein pictures of three males engaged in masturbation, fellatio and anal insertion of fingers.

5. That on the 22nd day of March, 1983 I entered the Denmark Bookstore and while in the store purchased a magazine entitled "Pleasure Fuckers" which contains

pictures depicting vaginal intercourse, anal intercourse, cunnilingus, fellatio, insertion of prosthetic device anally, excretion of male semen onto female person, licking of penis covered with male semen.

6. That while in the said Denmark Bookstore on March 22nd, 1983 I inspected the stock of movies, magazines and video tapes, available for public purchase and observed many magazines and movies containing portrayals and depictions of the following: Cunnilingus, fellatio, anal intercourse, vaginal intercourse, excretion of semen from penis onto persons, masturbation, vaginal or anal insertion of prostethic [sic] devices, insertion of tongue into anus, all of which are similiar in depiction to that described in Paragraph 4a thru g.

/s/ Timothy J. McCann

Subscribed and sworn to
before me this 22nd day
of March, 1983.

/s/ Wilson D. Burnell
Judge.

Exhibit "A"

(To Complaint for Search Warrant)

The demised premises shall consist of the two South buildings, and more specifically 224 Feet of frontage, as measured along U.S. Rt. #30 upon the following described premises:

> That part of the South half of the Northeast quarter of Section 12, Township 37 North, Range 8 East of the Third Principal Meridian, described as follows: Commencing at the point of intersection of the North line of the South half of said Northeast quarter with the Southwesterly line of the right of way of the

Elgin, Joliet and Eastern Railroad Company; thence Southeasterly along said Southwesterly right of way line 318.56 feet for the point of beginning; thence Southwesterly at right angles to the last described course 50 feet; thence Southeasterly parallel with said Southwesterly right of way line 130 feet; thence Northeasterly at right angles to the last described course 50 feet to said Southwesterly right of way line; thence Northwesterly along said Southwesterly right of way line 130 feet to the point of beginning; in the Township of Oswego, Kendall County, Illinois.

PARCEL ONE:

That part of the Stuth half of the Northeast quarter of Section 12, Township 37 North, Range 8 East of the Third Principal Meridian, described as follows: Commencing at the point of intersection of the North line of the South half of said Northeast quarter with the Southwesterly line of the right of way of the Elgin, Joliet and Eastern Railroad Company; thence Southeasterly along said Southwesterly right of way line 134.28 feet for the point of beginning; thence Southwesterly at right angles to the last described course 50 feet; thence Southeasterly parallel with said Southwesterly right of way line, 84.28 feet; thence Northeasterly at right angles to the last described course 50 feet to said Southwesterly right of way line; thence Northwesterly along said Southwesterly right of way line 84.28 feet to the point of beginning; in the Township of Oswego, Kendall County, Illinois.

PARCEL TWO:

That part of the South half of the Northeast quarter of Section 12, Township 37 North, Range 8 East of the Third Principal Meridian, described as follows: Commencing at the point of intersection of the North line of the South half of said Northeast quarter with the Southwesterly line of the right of way of the Elgin, Joliet and Eastern Railroad Company; thence Southeasterly along said Southwesterly right of way

line 218.56 feet for the point of beginning; thence Southwesterly at right angles to the last described course 50 feet; thence Southeasterly parallel with said Southwesterly right of way line.

EXHIBIT E

IN THE CIRCUIT COURT FOR THE 16TH JUDICIAL CIRCUIT, KENDALL COUNTY, ILLINOIS

STATE OF ILLINOIS)
) SS.
COUNTY OF KENDALL)

The People of the State of Illinois to all Peace Officers of the State of Illinois.

83-MR-4

SEARCH WARRANT

(Filed March 24, 1983)

On this day, Timothy McCann, Complainant, has subscribed and sworn to a complaint for search warrant before me. Upon examination of the complaint I find that it states facts sufficient to show probable cause and I therefore command that the following person or place: Building known as Denmark Bookstore, 1300 Business 30, Aurora, Kendall County, Illinois, premises described in attached Exhibit "A", incorporated herein, be searched and the following instruments, articles or things which have been used in the commission of, or which constitute evidence of the offense of OBSCENITY in violation of Chapter 38, Section 11-20, Illinois Revised Statutes,

BE SEIZED THEREFROM, NAMELY:

Magazines, movies and video tapes containing depictions or portions thereof of the following: Cunnilingus, fellatio, anal intercourse, vaginal intercourse, excretion of semen from penis onto other persons, masturbation, vaginal or anal insertion of prosthethic [sic] devices, insertion of tongue into anus; which has if considered as a whole a

predominant appeal to the pruirent [sic] interest and has no serious educational, literary, artistic or political value and has no socially redeeming value.

I further command that a return and invenotry [sic] of anything so seized shall be made without necessary delay before me or before any court of competent jurisdiction.

/s/ Wilson D. Burnell
Judge

Time and date of issuance 4:42 p.m. March 22, 1983.

EXHIBIT F

No. 83 C 2064

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SEQUOIA BOOKS, INC., an Illinois corporation, d/b/a Denmark II,

Plaintiff,

v.

CHARLES McDONALD, individually and in his capacity as Sheriff of the County of Kendall, Illinois, et al.,

Defendants.

TEMPORARY RESTRAINING ORDER

Plaintiff Sequoia Books, Inc. has petitioned the court for a temporary restraining order restoring to the plaintiff all items by the defendants, enjoining the defendants from further searches or seizures, and has prayed for a declaration that the search of plaintiff's premise and the seizure of films, videotapes, and magazines was pursuant to an invalid warrant, in violation of plaintiff's constitutional rights.

The court finds that the warrant described the items to be seized with sufficient particularity and was valid. Plaintiff's prayer for declaratory relief is therefore denied, as is the plaintiff's prayer for return of the property seized.

Plaintiff's prayer for relief is granted to the extent that a temporary restraining order is issued prohibiting the closing and locking of the business premises of the plaintiff in Aurora, Illinois, the removing of customers

from the business premise, and the prohibiting or discouraging customers from entering the premise by any means, including the posting of uniformed officers on or near the business premise.

This order shall remain in effect until April 14, 1983, at 10:30 a.m., and this matter is continued for further hearing on that date.

ENTER:

/s/ Frank J. McGarr
United States District Judge

DATED: March 28, 1983

EXHIBIT G

No. 83 C 2064

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SEQUOIA BOOKS, INC., an Illinois corporation, d/b/a Denmark II,

Plaintiff,

v.

CHARLES McDONALD, etc., et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff Sequoia Books, Inc., is an Illinois corporation operating a bookstore in Kendall County, Illinois. On March 23, 1983, sheriff's deputies of Kendall County arrived at plaintiff's premises and, pursuant to a search warrant, searched the premises for magazines and films of a nature generally described in the search warrant and believed to be in violation of the Illinois Anti-Obscenity law.

A large number of magazines and films were seized, the store was allowed to reopen, and, at a subsequent date, items which proved to be duplicates were returned, and the matter of prosecution for violation of the Illinois anti-obscenity statutes pends in Kendall County.

Plaintiff, alleging a constitutional violation and irreparable injury, has appealed to this court for injunctive relief requiring the return of items seized and a permanent injunction against any further searches and seizures based upon similar warrants.

This basic relief was denied in an earlier application for a temporary restraining order, although an order issued limiting the activities of the sheriff to those related to imminent prosecution and enjoining any activities designed to harass the plaintiff. The matter was continued to April 14 for further hearing. Testimony was taken and further argument heard.

The court finds, as was announced from the bench at the termination of the proceedings, that the search warrant in question, attached as an exhibit to the pleadings, described the property to be seized with sufficient particularity to satisfy the requirements of the Fourth Amendment.

The application of the plaintiff for a temporary restraining order and preliminary injunctive relief, as set forth in the complaint as amended, is denied. In light of the foregoing opinion, there being no circumstances which would justify the award of damages, plaintiff's prayer for damages is likewise denied and the complaint is dismissed.

ENTER:

/s/ Frank J. McGarr
United States District Court

DATED: April 14, 1983

EXHIBIT H

No. 83 C 3280

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

SEQUOIA BOOKS, INC., etc.,

Plaintiff,

v.

DALLAS INGEMUNSON, et al.,

Defendants.

PRELIMINARY INJUNCTION

Sequoia Books, Inc. ("Sequoia") has filed this action seeking declaratory, injunctive and money damage relief against Kendall County State's Attorney Ingemunson ("Ingemunson"), Kendall County Sheriff McDonald ("McDonald"), Kendall County Deputy Sheriff McCann ("McCann"), Kendall County itself and four unknown Kendall County Deputy Sheriffs. Sequoia's Complaint focuses on the issuance and execution of a search warrant under which more than 200 magazines were seized at its bookstore in Aurora, Illinois May 10, 1983.

Contemporaneously with its filing of the Complaint, Sequoia sought a temporary restraining order ("TRO"). At the May 12, 1983 TRO hearing, counsel for Sequoia and defendants appeared by oral notice and agreement. They also agreed that the same evidence presented to this Court on the TRO hearing would be the evidence for consideration as to the issuance of a preliminary injunction, and the hearing was accordingly converted by agreement to one for a preliminary injunction.

This Court has received and considered the following evidence:

1. Complaint Exhibit A is the search warrant issued by Associate Circuit Judge Richard Larson on May 9, 1983.

2. Complaint Group Exhibit B is the complaint for search warrant executed by McCann May 9, 1983 in the presence of Judge Larson, together with the attached legal description of Sequoia's bookstore and an affidavit in support of the complaint for search warrant, again executed by McCann in the presence of Judge Larson.

3. It was stipulated by the parties through their counsel that if called to testify, McCann would state that when he presented the documents in Complaint Group Exhibit B to Judge Larson, he tendered and the judge reviewed three magazines. Two of the magazines were those identified in paragraph 4 of the affidavit executed by McCann, and the third magazine was not identified during this Court's hearing but is understood also to have come from Sequoia's bookstore.

4. It was stipulated by the parties through their counsel that for purposes of determining the appropriateness of preliminary injuctive relief, the following allegations of the Complaint are true and correct:

> (a) On May 10, 1983 McCann and four unknown Kendall County Deputy Sheriffs went to Sequoia's business premises at 1300 Business 30, Aurora, Illinois, at approximately 10:00 o'clock a.m. They arrived in at least three vehicles, including at least one marked squad car, and brought a number of boxes into the premises.
>
> (b) At that time the officers presented a search warrant (Complaint Exhibit A) and for the next two

hours seized 222 magazines under the authority of the warrant. McDonald and Ingemunson had instructed the executing officers about the procedure they were to follow. They were to seize a single copy of every publication they felt contained depictions of sexual conduct listed in the search warrant.

(c) There were at least four customers on Sequoia's business premises watching motion picture films in the arcade portion of Sequoia's business, and when those customers entered the main room and saw the officers executing the warrant, they left the business premises, did not return to the arcade, and made no purchases. When the officers had arrived, McCann had advised Sequoia employees Frank Patroff and Sharon Collins that they were to be arrested and taken into custody, so those employees secured the store and closed it. In fact, both employees were arrested, taken into custody, booked and released on bail, in mid-afternoon of May 10, 1983.

(d) In all the executing officers seized 222 magazines, approximately 20 of which were single copies of a title and 40 of which had been subject to a prior seizure by the same officers March 23, 1983. None of those publications has ever been judicially declared obscene. In addition the officers seized 20 cellophane-wrapped packages of three magazines, within which the officer could see one cover of one magazine, the back cover of another magazine, and none of the contents of the third magazine in between.

(e) As a result of the search and seizure, Sequoia's business premises were effectively closed during the two-hour period May 10, 1983. Because of the threat of arrest Sequoia's employees were prevented from completing any over-the-counter sales, from the collection of any browsing fees and from making change for customers to use in viewing films in the arcade portion of the premises.

It has also been stipulated by the parties through their counsel that all the foregoing evidence constitutes the

record for purposes of the preliminary injunction hearing but, notwithstanding the provisions of Fed. R. Civ. P. ("Rule") 65(a) (2), shall not be part of the record in the event there is a subsequent trial on the merits. Based on the foregoing, this Court finds Sequoia has established a reasonable likelihood of success on the merits and makes the following further findings and conclusions:

1. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1331 and 1343.

2. All parties have appeared by agreement and have consented to this Court's enlarging of Sequoia's request for a TRO to one for a preliminary injunction.

3. Sequoia has met its burden of proof in its presentation of evidence at the hearing for preliminary injunction, and there is a reasonable basis to believe and conclude in fact and law that:

(a) As to magazines other than those referred to in paragraph 3 of the portion of this order describing the evidence in this case, Complaint Exhibit A (the search warrant) was the legal equivalent (though it surely was not the *literal* equivalent) of a general warrant. There was nothing in that warrant to prevent the executing officers from seizing magazines that the judicial officer who issued the warrant had not evaluated for a probable cause determination.

(b) In the form the warrant was issued, its seizure authorization language permits the seizure of magazines depicting specified sexual conduct. Although magazines depicting such conduct may in fact be obscene, it is not necessarily true that all magazines

depicting such conduct are obscene. Accordingly the warrant on its face is overbroad.

(c) Both the foregoing matters rendered the warrant in violation of Sequoia's rights under the First, Fourth and Fourteenth Amendments[1] to the United States Constitution.

4. Sequoia has no adequae remedy at law. Its business consists of the sale of items presumptively protected by the First Amendment, by reason of which the invalid search and seizure process followed by defendants demonstrates the potential for irreparable harm. Any balancing of Sequoia's rights against defendants' interests in investigation and law enforcement must weigh in favor of Sequoia, both because of the constitutional rights Sequoia asserts and because this order preserves to defendants the full right to proceed with proper law enforcement measures with respect to the magazines identified in the next paragraph. Further, there is nothing to prevent defendants from proceeding with further investigation and a properly conducted search and seizure process at Sequoia's business premises. There is no disservice to the public, therefore, by preservation of Sequoia's constitutional rights through the granting of the following injunctive relief.

IT IS THEREFORE ORDERED that defendants shall forthwith return to Sequoia all items seized from Sequoia's business premises May 10, 1983. However,

---

1 Because state action is involved, of course, only the Fourteenth Amendment is truly implicated. Nonetheless this order follows the conventional practice of also referring directly to the underlying Bill of Rights provisions incorporated by reference into the Fourteenth Amendment.

Sequoia is ordered to preserve the three magazines that were the subject of review by Judge Larson, to be delivered to defendants on demand to be used as evidence in any criminal prosecution. There has been no potential harm shown to defendants under this order if defendants were determined to have been wrongfully enjoined or restrained, and therefore there is no need for security. Accordingly this Court waives the requirement of a bond under Rule 65(c).

This preliminary injunction will remain in effect until further order of this Court.

/s/ Milton I. Shadur
United States District Judge

Date: May 20, 1983

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SEQUOIA BOOKS, INC., an Illinois Corporation,

Petitioner,

vs.

CHARLES McDONALD, individually and in his capacity as Sheriff of the County of Kendall, Illinois, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

Judge Burnell, the reviewing officer, had probable cause to believe that Sequoia Books, Inc., Petitioner, was selling obscene material, justifying the issuance of a search warrant.

The warrant was not a general warrant, and the seizure occurred without any exercise of discretion by the police officers themselves. Each item seized contained sexual depictions of a nature specifically described in the warrant.

ARGUMENT

THE SEARCH WARRANT ISSUED BY JUDGE BURNELL WAS CONSISTENT WITH PRIOR HOLDINGS OF THIS COURT IN *LO-JI SALES, INC. v. NEW YORK,* 442 U.S. 319 AND *MARCUS v. SEARCH WARRANTS,* 367 U.S. 717.

Generally

The First Amendment to the U.S. Constitution does not protect obscene materials. *Miller v. California,* 413 U.S. 15 (1973); *Memoirs v. Massachusetts,* 383 U.S. 415 (1966); *Roth v. United States,* 354 U.S. 476 (1957). On the other hand, when it comes to obtaining a warrant to search for obscene materials, the warrant must clear "a higher hurdle in the evaluation of * * * reasonableness" under the Fourth Amendment[1] than must similar actions aimed at mere contraband because the determination of what is "unreasonable" is made in light of the "values of freedom of expression." *Roaden v. Kentucky,* 413 U.S. 496 (1973).

To ensure the sanctity of those values, this Court has prescribed a "step in the procedure before seizure designed to focus searchingly on the question of obscenity." *Marcus v. Search Warrants of Properties, Etc.,* 367 U.S. 717, 732 (1961). Within that framework, a warrant can properly issue only after there has been an independent determination by a neutral magistrate as to the issue of obscenity. It *is not* proper for the magistrate at the time of issuance of the warrant to (1) rely solely upon the conclusory asser-

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[1] The Fourth Amendment, in relevant part, provides that:

> no warrants shall issue, but upon probable cause * * * particularly describing the * * * things to be seized.

U.S. CONST., amend. IV.

tions of police officers as to the issue of obscenity; or (2) to leave it to the discretion of executing officers to seize materials which are obscene. *Lee Art Theater, Inc. v. Virginia,* 392 U.S. 636, 637 (1968); *Heller v. New York,* 413 U.S. 483 (1973); *Lo-Ji Sales, Inc. v. State of New York,* 442 U.S. 319 (1979); *Marcus v. Search Warrants of Properties, Etc.,* 367 U.S. 717 (1961); *Miller v. California,* 413 U.S. 15 (1973); *United States v. Guarino,* 729 F.2d 864 (1st Cir. 1984). In either instance, the result is the same. The executing officer is left with the discretion of determining whether the communicative item is obscene.

A warrant is properly issued when it is the magistrate who determines whether probable cause exists that a violation of the obscenity laws has occurred. The executing officer must not make obscenity determinations.

In *Miller v. California,* this Honorable Court provided "basic guidelines for the trier of fact" in determining the issue of obscenity. These same guidelines are the standards which must be satisfied by the magistrate in his determination that a violation of the obscenity laws has occurred.[2] *See, United States v. Ventresca,* 308 U.S. 102, 107 (1965).

For Judge Burnell, the judicial officer in this case, to find probable cause existed for the issuance of the warrant in question—that Sequoia Books was selling obscene materials in derogation of the criminal code—required that he first find that the publications were, in fact, obscene

[2] There is a difference, however, between the showing by the magistrate and the quantum of evidence necessary to obtain a final judicial determination of obscenity—the *degree* of evidence—with less being required for probable cause than for proof beyond a reasonable doubt.

in violation of Ill.Rev.Stat., ch. 38, ¶ 11-20.[3] Under *Miller*, to do that required a determination that "Pleasure Fuckers"[4] was obscene when based against this standard:

> Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable * * * law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

An examination of the facts of this case, as developed,[5] reveals that all three factors of the *Miller* test were

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[3] Ill.Rev.Stat., ch. 38, ¶ 11-20, provides in relevant part:

> A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:
>
> (1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; * * *
>
> * * *
>
> A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.
>
> * * *

[4] The particular magazine purchased by Investigator McCann and delivered to the chambers of the reviewing officer.

[5] The district court granted a Motion to Dismiss, and so there was no development of the facts of the case. The nature and length of examination given by Judge Burnell to the materials brought to his chambers by Investigator McCann, therefore is unknown. It is known that Investigator McCann delivered the magazine "Pleasure Fuckers" to the Judge's Chambers prior to the warrant issuing.

satisfied and that the judge otherwise had probable cause to believe that Sequoia Books was selling obscene materials.

Indeed, on March 22, 1983 Illinois 16th Judicial Circuit Judge Wilson Burnell was presented with a request for the issuance of a warrant by Kendall County State's Attorney's office investigator Tim McCann. McCann, in seeking the warrant, brought to the Judge's chambers a copy of "Pleasure Fuckers", which had been purchased by him earlier that day. Supplanting the presence of that magazine was McCann's affidavit, which indicated that other magazines sold by Sequoia Books were the subject of criminal prosecutions for obscenity. In each instance, McCann detailed descriptions of the contents of the magazines.[6]

All of this occurred within the detached setting of the Kendall County courthouse. Judge Burnell determined that Sequoia Books was selling materials deemed obscene under the test enunciated by this Court in *Miller*. He then considered the descriptions of the seven other magazines already the subject of obscenity charges.

It is a basic principle that in judging probable cause, the issuing judge is not confined by niggardly limitations or by restrictions on the use of common sense. *Spinelli v. United States*, 393 U.S. 410, 419 (1969). Judge Burnell was on solid ground in considering the magazine and affidavit in determining that probable cause existed; that obscene materials were being offered for sale by Sequoia Books in violation of Ill.Rev.Stat., ch. 38, ¶ 11-20.

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[6] Circuit Judge Posner characterized McCann's description as "in minute and indeed rather disgusting detail." *Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091, 1093 (7th Cir. 1984).

On the basis of his determination, the judge directed the officers to seize the following described materials:

> Magazines, movies and video tapes containing depictions, or portions thereof, of the following: Cunnilingus, fellatio, anal intercourse, vaginal intercourse, excretion of semen from penis onto other persons, masturbation, vaginal or anal insertion of prosthethic [sic] devices, insertion of tongue into anus; which has if considered as a whole a predominant appeal to the pruirent [sic] interest and has no serious educational, literary, or artistic or political value and has no socially redeeming value.

The officers then went out and seized one copy of each item containing any of those described sexual acts. Subsequent to the seizure, a prompt determination of the obscenity issue was available at the request of Sequoia Books (or any other interested party) under Ill.Rev.Stat., ch. 38, ¶ 108-12.[7]

This Court has said that if:

> a seizure is pursuant to a warrant issued after a determination of probable cause by a neutral magistrate, and following the seizure a prompt judicial determination of the obscenity issue is available at the request of any interested party, the seizure is constitutionally permissible.

Heller v. New York, 413 U.S. 483, 492 (1973).

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[7] Ill.Rev.Stat., ch. 38, ¶ 108-12 provides in relevant part:

> Disposition of Obscene Material
>
> In the case of any material seized * * * the judge or court before whom the material is returned shall, upon written request of any person from whom the material was seized, or any person claiming ownership or other right or possession of such material, enter an order providing for a hearing to determine the obscene nature thereof, not more than ten days after such return * * *.

The Warrant Was Not a General Warrant

Even though the warrant was issued upon a showing of probable cause, Sequoia Books argues, the warrant is nevertheless a general warrant and, thus, constitutionally impermissible.

> * * * [h]istory indispensably teaches * * * that the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis of their seizure is the ideas which they contain. [citations deleted]. No less a standard could be faithful to First Amendment freedoms * * *.
>
> * * *
>
> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Marron v. United States, 275 U.S. 192, 196 (1927).

The warrant in this case left nothing to the discretion of the executing officers. The warrant directed the officers to seize magazines, movies and video tapes containing depictions of certain sexual acts. Judge Burnell was cautious (perhaps overly cautious) of the rights of those involved as is evidenced by his limiting language deemed by both the trial court and court of appeals to have been surplusage. *Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091, 1093 (7th Cir. 1984).

Under the operative portions of the warrant, the executing officers were directed to seize only magazines containing certain sexual acts. If they did contain the designated acts, they were to be seized. If the magazines did

not contain the acts, they were not seized. There was no discretion left to the police officers. The fact that there was no discretion vested in the officers is manifested by the fact that Sequoia Books has not alleged, at any point during these proceedings, that any magazine seized by the officers was not specifically delineated by Judge Burnell within the warrant. The warrant was not open ended. It was specific, not general. It was constitutionally proper.

Authorities Relied Upon By Petitioner Are Distinguishable

In *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325 (1979) the officer was vested with discretion to determine "other similarly obscene materials." The police officers in *Lo-Ji*, thus, had to determine whether the communicative items were obscene. To seize books containing specifically described and defined sexual acts, on the other hand, *does not* require the exercise of discretion. The warrant in *Lo-Ji Sales* contained no standard at all and involved participation in the raid by the judicial officer, who thereby lost his neutrality.

In *A Quantity of Copies of Books v. State of Kansas*, 378 U.S. 205 (1964), there was a standard but it was too constitutionally broad, in that it sought the seizure of any book which was designated an "original Night Stand book." That was, in essence, seizure by publisher not content.

In *Marcus v. Search Warrants of Properties, Etc.*, 367 U.S. 717 (1961), this Court determined that the issue of obscenity could not be left to the discretion of the police officers, even if made prior to the seeking of the warrant.[8]

[8] *Marcus* is equally distinguishable from the present facts because it involved the seizure of 11,000 copies of magazines. Here, there

(Footnote continued on following page)

In the case before this Honorable Court the warrant did not leave to discretion the question of obscenity. The police officers were limited in their seizure to magazines, movies and tapes containing certain specific, described acts. The warrant was not a general warrant and did not violate either the First or Fourth Amendments to the U.S. Constitution.

To adopt the position advanced by Petitioner in this case would mean that one could never obtain a constitutionally valid search warrant for seizure of obscene writings or other communications that are as yet unseen, no matter how concrete or compelling the cause for the search. Law enforcement officers would have to buy every issue of every magazine or movie or tape that they suspect obscene. Those purchases would raise suspicion on the part of the store clerk as to the identity of the purchaser and thus thwart the law enforcement process. In the instant case, Judge Burnell was presented with facts establishing probable cause that Sequoia Books was selling obscene materials. He then ordered the seizure of communicative items containing only certain, described sexual acts. As to the officers who executed the search warrant, nothing was left to their discretion. The warrant and procedure were both proper. *See, Stanford v. Texas*, 379 U.S. 476, 485 (1965).

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[8] *continued*
was a seizure of only one of each magazine, and even then Sequoia Books was afforded the protection of Ill.Rev.Stat., ch. 38, ¶ 108-12.

CONCLUSION

By reason of the foregoing, the Petition for Writ of Certiorari of Sequoia Books, Inc. should be denied by this Honorable Court.

Respectfully submitted,

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